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No. 06-11206

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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To determine whether a prior offense is a "violent felony," the ACCA directs a focus on the "conduct" "involve[d]" in committing the offense. 18 U.S.C. § 924(e)(2)(B)(ii). This Court's decision in *Begay* v. *United States* followed that direction, and concluded that the conduct involved in committing the offense must be "purposeful, violent and aggressive." 128 S. Ct. 1581, 1586-87 (2008).

The government goes to great lengths to ignore the conduct encompassed by the elements of failure-to-report escape. The government cannot point to any violent or aggressive act involved in committing the offense. To the extent the government even attempts to identify the conduct involved in committing failure-to-report escape, it refers to the "offender's deliberate decision not to report to prison." U.S. Br. 27; *see also id*. at 28 (suggesting that the conduct is "a conscious decision to achieve [a] result"). But a "deliberate decision" is thought, not conduct. And even if it were conduct, a "deliberate decision" is neither violent nor aggressive.

Rather than focus on the conduct encompassed by the elements of failure-to-report escape, the government argues that the offense is violent and aggressive because dangerous circumstances are created by the commission of the offense, *plus* the decision of law enforcement to prioritize arrest of failure-to-report escapees, *plus* the prior criminal history and supposed special aversion to prison of such offenders. As the government would have it, the failure-to-report escapee should be treated as if he had committed the different crime of resisting arrest. Only by fundamentally changing the offense can the government transform the inaction essential to

commit failure-to-report escape into violent and aggressive conduct. U.S. Br. 36; *see also id*. at 13-20.

This Court should reject the government's approach for numerous reasons. The government asks this Court to abandon the categorical rule, established by this Court's precedent, which evaluates an unenumerated offense based solely on the conduct encompassed by its elements. The government's approach also conflicts with *Begay*, would impose great burdens on courts applying the residual subclause in future cases by inviting the courts to draw doubtful inferences from haphazardly compiled data (as the government has done here), and would raise serious constitutional concerns.

In addition, the government misses the mark when criticizing petitioner's approach on the ground that the enumerated offenses will often produce injuries after the offense is complete. U.S. Br. 30-33. Petitioner's approach is indifferent to when an injury occurs. Following this Court's decisions, petitioner focuses on whether *dangerous circumstances* are created by the conduct encompassed by the elements of the offense, and that conduct alone. It simply cannot be said that the conduct encompassed by the elements of failure-to-report escape by itself creates dangerous circumstances similar to those created by the enumerated offenses.

Finally, even if this Court were to conclude that failure-to-report escape involves purposeful, violent and aggressive conduct, it still would have to determine whether the residual subclause extends to crimes beyond those targeting property. The government does not deny that failure-to-report escape does not target property. Instead, it argues that the residual subclause should not be so limited. But the government has offered no legitimate basis to

adopt a broad interpretation of the residual subclause that would swallow clause (i) of the definition of "violent felony," and that would ignore the substantial evidence, both structural and in the Act's drafting history, supporting a property crime limitation.

I. FAILURE-TO-REPORT ESCAPE DOES NOT INVOLVE VIOLENT AND AGGRESSIVE CONDUCT.

The failure-to-report escapee merely knowingly fails to report to prison when he is under a legal obligation to do so. He does nothing violent. He does nothing aggressive. He does nothing at all.

The judgment of the court of appeals, therefore, must be reversed because, as petitioner has argued, Pet. Br. 20, the ACCA's definition of "violent felony" is limited to crimes whose elements encompass violent and aggressive conduct. Petitioner's view follows from the statutory text and the categorical rule consistently applied by this Court to the ACCA. The government's various reasons for rejecting petitioner's view cannot withstand scrutiny.

A. An Unenumerated Offense Involves Violent And Aggressive Conduct If The Conduct Encompassed By Its Elements, And That Conduct Alone, Creates Dangerous Circumstances Similar To Those Created By The Conduct Encompassed By The Elements Of The Enumerated Offenses.

In *Begay*, this Court held that the residual subclause is limited to crimes that are "roughly similar, in kind as well as degree of risk posed," to the enumerated offenses. 128 S. Ct. at 1585. This Court further explained that an unenumerated

offense is similar "in kind" if it, like the enumerated offenses, "typically involve[s] purposeful, 'violent,' and 'aggressive' conduct." *Id.* at 1585, 1586.

Critically, the purposeful, violent, and aggressive conduct standard emerged from this Court's examination of the conduct encompassed by the elements of the enumerated offenses. This Court relied on the analysis in *Taylor* of the generic elements of burglary, and it referenced only the generic elements of the various other offenses. *Id.* at 1586.

Given this Court's exclusive focus on the conduct encompassed by the elements of the enumerated offenses, there is no basis in the language or rationale of *Begay*, or any other decision of this Court, for looking beyond the conduct encompassed by the elements of an *un*enumerated offense to determine whether that offense involves violent and aggressive conduct. Indeed, considering only the conduct encompassed by the elements of the offense follows from this Court's consistent practice of viewing predicate offenses on a categorical basis.

When this Court first confronted the ACCA, it noted that "Congress intended that the enhancement provision be triggered by crimes having certain specified elements." *Taylor* v. *United States*, 495 U.S. 575, 589 (1990). This "categorical approach" "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense" in determining whether a prior conviction is a violent felony. *Id.* at 602. In *Shepard* v. *United States*, this Court explained that *Taylor*'s "categorical approach" "refers to predicate offenses in terms … of … the 'element[s]' of crimes." 544 U.S. 13, 19 (2005) (alteration in original). That focus was repeated in *James* v. *United States*, which directed

lower courts to consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." 127 S. Ct. 1586, 1597 (2007); *see id.* at 1594 (courts should consider "whether the elements of the [predicate] offense are of the type that would justify its inclusion within the residual provision") (emphasis omitted). And most recently, in *Begay*, this Court not only began its discussion by acknowledging that it was guided by the categorical rule, 128 S. Ct. at 1584 ("we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense"), but also exclusively focused on "the conduct for which the drunk driver is convicted," and rejected other considerations advanced by the government, in determining whether felony DUI was similar in kind to the enumerated offenses. *Id.* at 1587.

A focus on the conduct encompassed by the elements of the predicate offense also stems from the ACCA's text and the long recognized fact that the ACCA targets "'inherently dangerous'" crimes. *Taylor*, 495 U.S. at 585 (quoting *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 14 (1986)). The residual subclause directs a focus on the "conduct" "involve[d]" in committing the offense, 18 U.S.C. § 924(e)(1)(B)(ii), which is to say the conduct encompassed by the elements of offense. Likewise, the elements of the offense make up the conduct that categorically *inheres* in a prior conviction. *Shepard*, 544 U.S. at 24 (Souter, J.) (stating that "any sentence under the ACCA [must] rest on a showing that a prior conviction 'necessarily' involved" certain facts). As discussed in petitioner's brief, the conduct

encompassed by the elements of each of the enumerated offenses *alone* inherently creates dangerous circumstances. Pet. Br. 16-19. The conduct encompassed by the elements of burglary and extortion create a substantial risk of a violent confrontation. *Taylor*, 495 U.S. at 588 (discussing the "inherent potential for harm to persons" from generic burglary); *James*, 127 S. Ct. at 1607 (Scalia, J., dissenting) (extortion's potential for violent confrontation is even greater than that from burglary because extortionist necessarily threatens another). And, as even the government acknowledges, the conduct encompassed by the elements of arson and crimes involving the use of explosives is inherently dangerous because of the risk to others from the potential release of a harmful force. U.S. Br. 26-27.

The fact that the conduct encompassed by the elements of each enumerated offense, by itself, creates dangerous circumstances is the foundation for the inference that an offender with three prior "violent felonies" is someone who, if later possessing a gun, is more likely to "use [it] deliberately to harm a victim." *Begay*, 128 S. Ct. at 1586. The Court in *Begay* drew the inference of future dangerousness from the fact that Congress had enumerated "[c]rimes *committed* in … a purposeful, violent and aggressive *manner*." *Id.* (emphases added). "That conduct" alone—namely, the conduct encompassed by the elements of the offense—supports Congress's decision to punish such a felon more harshly than others. *Id.* Likewise, only those unenumerated crimes the elements of which include violent and aggressive conduct can support an ACCA sentencing enhancement.

The government responds to petitioner's argument by distorting it. The government says petitioner has

argued that an offense is violent and aggressive only when "any potential violence or injury" to another occurs during the commission of the offense. U.S. Br. 29-30. It then explains that such a standard must be wrong because injuries to others often occur after the enumerated offenses are complete, and that such a standard would exclude what it considers obviously violent crimes—"like placing a biological toxin in a mass transportation vehicle"—from the scope of the Act. *Id.* at 30-32. The government has contructed, and ably burned, a straw man.

As petitioner explained, Pet. Br. 15-21, and repeats here, this Court's decisions dictate that an offense involves violent and aggressive conduct if the conduct encompassed by its elements, and that conduct alone, creates dangerous circumstances similar to those created by the conduct encompassed by the elements of the enumerated offenses. This does not mean that any actual injury to another need occur during the commission of the offense. But it does mean that the *dangerous circumstances* must be created merely by engaging in the conduct encompassed by the elements of the offense. Someone who places a biological toxin in a mass transportation vehicle has created dangerous circumstances very much like crimes involving the use of explosives or arson simply by engaging in the conduct encompassed by the elements of the offense. *See* 18 U.S.C. § 1992(a)(2). That injuries to others may occur *after* that conduct is complete does not matter under petitioner's interpretation of the statute.

B. The Conduct Encompassed By The Elements Of Failure-To-Report Escape Is Not Violent And Aggressive.

The government only barely discusses the conduct encompassed by the elements of failure-to-report

escape. But it does suggest that the "conscious decision" not to report can be deemed violent and aggressive conduct.[1] U.S. Br. 28. That is wrong.

A "conscious decision" is not conduct. The government tacitly concedes as much when acknowledging that the "means" used by the failure-to-report escapee to achieve the consciously sought-after result are indeterminate. U.S. Br. 28. The government asks this Court to treat as "irrelevant" the fact that elements of the offense permit the crime to be committed by doing nothing. *Id.* But not only does *Begay* refuse to treat the manner in which the crime is committed as irrelevant, it also makes the manner in which the crime is committed the central object of the inquiry. 128 S. Ct. at 1586 (explaining that the object of the ACCA is "[c]rimes committted in … a purposeful, violent and aggressive *manner*") (emphasis added).

This Court's decision in *James*, too, makes clear that the "conduct" that must be violent and aggressive, and create dangerous circumstances, is separate from any "conscious decision" that the elements of the offense might also require. *James* held that attempted burglary is a "violent felony" under the residual subclause only when the elements of the offense require "an overt act directed toward the entry of a structure." 127 S. Ct. at 1596. It expressly refused to hold that attempted burglary is a "violent felony" under the ACCA in states where attempted burglary is defined to include mere "preparatory conduct"—conduct like making a duplicate key or casing a building. *Id*. at 1596 & n.4.

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[1] Contrary to the government's suggestion, U.S. Br. 23, 25, Petitioner does not deny that failure-to-report escape is "purposeful" within the meaning of *Begay*.

The "conscious decision" of the attempted burglar in preparatory-conduct states is the same as that in other states: the offender has decided to try to unlawfully enter a structure with the intent to commit a felony. *See, e.g.*, *United States* v. *Strahl*, 958 F.2d 980, 986 (10th Cir. 1992) (noting that while "an attempted burglary conviction [under Utah law] may be based upon [preparatory] conduct" "the state must establish … that the defendant took these steps 'with the kind of culpability otherwise required' for the commission of a burglary"). Yet this Court made clear that it would leave for another day—or lower court resolution—"whether the more attenuated *conduct* encompassed by" preparatory-conduct laws justified including convictions under those statutes as violent felonies. *James*, 127 S. Ct. at 1596 (emphasis added); *see United States* v. *Fell*, 511 F.3d 1035, 1044 (10th Cir. 2007) (post-*James* decision concluding that conspiracy to commit burglary under Colorado law is not a "violent felony" because "overt act" requirement can be satisfied by "attenuated conduct" that "create[s] no risk of a violent confrontation").

In any event, even if a "conscious decision" could be deemed conduct, it surely is not violent and aggressive. The government never advances the absurd suggestion that *deciding*—a purely mental process—is violent and aggressive. It is not. *United States* v. *Templeton*, __ F.3d __, 2008 WL 4140616, at *5 (7th Cir. Sept. 9, 2008) (a prisoner who "fails to return from … furlough … is guilty of escape without so much as moving a muscle").[2] Instead, the

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[2] The government mischaracterizes petitioner's point that the offense can be committed while sleeping. Petitioner never said anything about accidentally oversleeping. *Compare* U.S. Br. 26, *with* Pet. Br. 14. The point, the same one Chief Judge

government argues that sometimes deciding not to do what the law requires can produce harm and can be a crime. U.S. Br. 28-29 (discussing potential for homicide or arson from failure to act when the law imposes a duty to do so). But this is a distraction, not an explanation for the counterintuitive notion that deciding is violent and aggressive.

That a failure to act can produce harm does not transform the failure to act into violent and aggressive conduct. A parent who refuses to provide medical care to his child knowing that the child is seriously injured bears responsibility for the harm suffered and has committed a crime, but not in a violent and aggressive manner. *See Woods* v. *State*, 724 So.2d 40, 48 (Ala. Crim. App. 1997). And if the government means to suggest that the rule proposed by petitioner would preclude treating arson, burglary, and homicide as violent felonies in the unusual case involving a failure to act, then the government does not understand the categorical rule. Arson, burglary, and homicide are categorically violent felonies under the ACCA, regardless of the "unusual cases" the government hypothesizes. *James*, 127 S. Ct. at 1597; *Begay,* 128 S. Ct. at 1584 ("we consider the offense generically … not in terms of how an individual offender might have committed it on a particular occasion").

Likewise, that a failure to act is not violent and aggressive conduct means that a "continuing" failure to act is not violent and aggressive either. The government's argument that failure-to-report escape is a continuing offense in numerous jurisdictions is thus irrelevant. U.S. Br. 33-35. The conduct

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Easterbrook makes in *Templeton*, is that the offense requires no physical act at all.

encompassed by the elements of the offense is not violent and aggressive from the start, and the conduct encompassed by "continuing" to fail to report—which is the very same conduct—is also not violent and aggressive.

C. The Risk Of Confrontation During Recapture Does Not Mean Failure-To-Report Escape Involves Violent And Aggressive Conduct.

The government argues that failure-to-report escape involves violent and aggressive conduct because the crime "creates a clear risk of a confrontation during recapture efforts in which law enforcement officers or bystanders may be injured." U.S. Br. 27. Accepting this argument requires abandoning the categorical approach this Court has consistently applied, creates enormous practical difficulties in applying the statute to other unenumerated crimes, would destroy the distinction this Court drew in *Begay* between the risk of harm and the manner in which the crime is committed, and would raise grave constitutional concerns. There is no support for the government's position.

The government asks this Court to reason as follows. Failure-to-report escape is violent and aggressive if the commission of failure-to-report escape creates a serious potential risk of violent confrontation between law enforcement and failure-to-report escapees. U.S. Br. 12-13, 35-36.[3] The

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[3] Though the statute says that the offense must involve conduct that presents a "serious potential risk of *physical injury* to another," 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), the government denies that it must demonstrate a serious potential risk of *actual injury* to another. U.S. Br. 21. There is no indication that the government even attempted to gather

government reports that law enforcement officials prioritize capture of failure-to-report escapees and that such escapees are captured at a high rate. *Id.* at 14-15, 36. From this premise, the government asks this Court to *infer* that there is a serious potential risk of confrontation between law enforcement and the failure-to-report escapee. *Id.* at 36.

But a risk of confrontation is insufficient; the confrontation, even in the government's view, must have the serious potential to be violent. To establish that potential, the government contacted various state correctional officials and asked them to compile data on the criminal histories of non-custodial escapees.[4] The government compiled its made-for-this-proceeding data into the tables attached to its brief.[5] The government's attorneys made no effort to confirm the data reported to them. Reply App. 3a. From this data, the government reported that anywhere from 40% to 77% of non-custodial escapees in the respective states have a history of violent criminal conduct. U.S. Br. 16-17 & n.5. The higher figures depend on defining drug possession and distribution crimes as "violent," which the government included based on the association of the drug

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information from any source on the existence (much less rate) of actual injuries to law enforcement or bystanders in connection with failure-to-report escape.

[4] The government filed with this Court the letter and information it provided to petitioner's counsel on October 15, 2008. For ease of reference, petitioner has reproduced that letter and the information on Florida and Massachusetts, referred to later in this brief, in the appendix to this brief.

[5] Petitioner is unaware of which states were contacted. But the government has indicated that several of those states did not provide any data, or any data distinguishing custodial escapes from non-custodial escapes. Reply App. 2a-3a.

trade in general with violence. *Id.* at 17 n.5.[6] The government also speculates that failure-to-report escapees are particularly averse to prison based on the fact that they failed to report. *Id.* at 18, 36. Based on its calculations and speculation, the government asks this Court to *infer* that the failure-to-report escapee is likely to respond violently when the *inferred* confrontation between the escapee and law enforcement takes place. *Id.* at 18-19, 36.

This elaborately constructed pseudo-statistical presention, laying inference upon inference, ultimately amounts to this: failure-to-report escape can be expected to lead to resisting arrest, and therefore this Court ought to treat failure-to-report escapees as if they have engaged in conduct that amounts to resisting arrest. This Court need not today determine whether resisting arrest is a violent felony under the residual subclause.[7] But it should, for a variety of reasons, make clear that the residual

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[6] The government appears to have erred in calculating the percentage of escapees in Florida with violent criminal histories. Considering the crimes the government has deemed violent, *see* U.S. Br. 17 n.5, including drug offenses, 68% (396 out of 585), Reply App. 9a, were serving time for "violent crimes," not 76% as the government reported, *see* U.S. Br. 16. The fall-off from subtracting drug cimes is substantial, reducing the portion to 37% (214 out of 585), which is lower than what the government had reported as the lowest percentage among the states it considered, *see id*. 17 n.5.

[7] In Illinois, felony resisting arrest is accomplished by "knowingly resist[ing] or obstruct[ing] the performance by one known … to be a peace officer … of any authorized act within his official capacity," that results in an injury to the officer. 720 Ill. Comp. Stat. Rev. 5/31-1(a), (a-7). Federal law defines "forcibly" resisting arrest alongside assaulting an officer, *see* 18 U.S.C. § 111(a)(1), but only considers it a felony when there is physical contact, *see id*. § 111(a).

subclause of the ACCA cannot be interpreted to allow a court to treat a conviction for one predicate offense as if it were a conviction for a different, more violent, predicate offense.

1. The government is proposing a substantial intrusion on the categorical approach. Law enforcement priorities are not part of the offense conduct. Whether a failure-to-report escapee has a violent criminal history is not part of the offense conduct. By even introducing the question of what might happen when law enforcement officials attempt to capture a failure-to-report escapee, the government is asking this Court to consider cirumstances created by some conduct *other* than the conduct encompassed by the elements of the offense.

Indeed, the government admits as much when it argues that a potential capture is "closely related" to the "offense conduct that constitutes escape." U.S. Br. 35.[8] In other words, it is not part of the "offense conduct" itself. The government offers no reason, other than its desire to sweep failure-to-report escape within the residual subclause, for compromising this Court's uniform adherence to the categorical approach. *See Shepard*, 544 U.S. at 23 (discussing

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[8] The government argues that capture is "closely related" to failure-to-report escape in a way that is different from other crimes because "the conduct involved in an ordinary crime does not include the avoidance of custody." U.S. Br. 35. But all crimes typically involve the avoidance of custody. *See id.* at 14 ("A burglar generally goes out of his way to ensure that his offense goes undetected …."); *United States* v. *Gourde*, 440 F.3d 1065, 1078 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting) ("common sense suggests that [the defendant child pornographer] liked to stay out of jail"). This supposed distinction between failure-to-report offenders and other offenders is no distinction at all.

how "time has enhanced even the usual precedential force" of the categorical rule because Congress has not modified the statute since that approach was adopted in *Taylor*). This Court has in the past rejected the government's "call to ease away from" the categorical approach. *Id.* It should do so again here.

2. As the government's own last-minute effort to create a record in this case reveals, the government's approach would impose insuperable burdens on courts administering this statute. One of the virtues of the categorical approach, and reasons for its adoption, is its relative ease of administration. *Taylor*, 495 U.S. at 600-02; *Shepard*, 544 U.S. at 20. Under the categorical approach, courts consider only readily available and verifiable information about the offender's prior conduct.

Under the government's approach, anything is fair game. The government here relies on anecdotal examples of violent confrontations, along with unverified data compiled on a haphazard basis, as the government was at the mercy of the ability and inclination of state officials to respond. Far from promoting consistency in the application of a statute that has been before this Court in each of the past three terms, the government's approach promises only greater variation in outcomes, as different courts receive different information and evaluate its quality based on different standards.

The uncertainty in the application of the government's approach is underscored by the substantial reason to doubt, as a matter of fact, the validity of the inferences the government asks this Court to draw from the data it compiled. The government asks the Court to *infer* from the data it created that there exists a substantial risk of violent

confrontations associated with failure-to-report escape. But the government did not report in its brief that it *directly asked* state officials to report such incidences. Reply App. 2a. The government received such data from two states: Massachusetts and Florida. Between them, those states reported 620 non-custodial escapes. *Id.* at 9a, 12a-14a. And between them, those states reported just 3 incidences of violence associated with efforts to capture the non-custodial escapees. *Id.*

In short, the government's own data contradict the very inferences it is asking this Court to draw. The data actually suggest law enforcement officials are able to reincarcerate non-custodial escapees at a high rate without much risk of violent confrontations. As a result, failure-to-report escape can be excluded from the residual subclause because it is not "roughly similar … in degree of risk posed" to the enumerated offenses. *Begay*, 128 S. Ct. at 1585. The low rate of violent confrontations associated with non-custodial escape—from the government's data, less than 0.5%—underscores the complete absence in the government's brief of even a single reported incident of actual injury to law enforcement officials or an innocent bystander in connection with a non-custodial escape.

Nothing in the policies of the ACCA or basic principles of sound judicial administration recommend the government's approach. For this additional reason, this Court should adhere to the categorical approach and consider only the conduct encompassed by the elements of failure-to-report escape.

3. The government's approach also would require this Court to undo *Begay* before the ink has dried on the opinion. The government argues that failure-to-report escape is violent and aggressive because the

risk of a violent confrontation during capture efforts is greater for failure-to-report escape than other crimes. U.S. Br. 35-36. But *Begay* separated the question of the degree of risk of injury from the manner of commission of a predicate offense; it requires that an unenumerated offense be similar to the enumerated offenses in *both* respects. 128 S. Ct. at 1284-85; *Templeton*, 2008 WL 4140616, at *5 ("*Begay* requires similarities *other* than risk of injury."). By asking the Court to define the manner of commission of a crime as violent and aggressive *because* it (supposedly) carries the requisite degree of risk, the government is merely pretending to apply the violent and aggressive conduct standard. In fact, it is asking this Court to eliminate it. Fidelity to precedent, especially on a matter of statutory interpretation, demands more. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1074, *as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994).

4. Finally, the government's approach also raises grave constitutional concerns.

To begin, the separation of powers concerns discussed in petitioner's brief, Br. 40-41, would be heightened if this Court were to adopt the government's approach. As the government would have it, the executive branch would have a substantial role in determining what crimes are included within the residual subclause. The government believes that courts should consider the degree to which law enforcement officials, including the U.S. Marshals Service, devote resources to apprehending those who commit an unenumerated offense. U.S. Br. 14-15, 35-36. Of course, the

executive branch has essentially unreviewable discretion over how to allocate its investigatory resources. *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). By the government's logic, a decision by the Justice Department to prioritize purely financial crimes would increase the risk of violent confrontation upon apprehension, perhaps to the point courts would have to deem them violent felonies under the ACCA. The content of a federal criminal statute should not be subject to variation based on unilateral executive branch judgments. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommen-dation and veto, has no legislative power.").

The vagueness concerns raised by petitioner, Pet. Br. 39-40, would also be heightened if the government's approach were adopted. It is difficult to imagine how "ordinary people," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), are supposed to understand what prior offenses are included within the residual subclause if, to figure that out, they must contact various state officials, gather and interpret the data provided, and contact law enforcement officials to determine where their priorities lie. If the residual subclause were interpreted in a way that required this process to be repeated for future unenumerated offenses, the constitutional vagueness concerns would be substantial.[9]

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[9] Likewise, the rule of lenity also should apply here if the government's approach is to be adopted. The government argues against application of the rule of lenity because it asserts that

Indeed, the government's approach is so radical that it would reignite the constitutional concern that the ACCA violates *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *See James*, 127 S. Ct. at 1600 (explaining that "by applying *Taylor*'s categorical approach, we have avoided" the Sixth Amendment issue); *Shepard*, 544 U.S. at 24-26 (Souter, J.) (discussing how the categorical approach avoids the "serious risk of unconstitutionality" under *Apprendi*); *see also id.* at 27-28 (Thomas, J., concurring) (stating that even the categorical rule of "*Taylor*[ ] has been eroded by this Court's subsequent Sixth Amendment jurisprudence"). The government is asking this Court to increase the maximum punishment to which petitioner is subject on the basis of certain factual findings. That raises substantial concerns under *Apprendi*.

For example, the prospect of a confrontation between failure-to-report escapees and law enforcement is a factual question. The government asks this Court to infer that the prospect of confrontation is high because law enforcement officials are dispatched to capture failure-to-report escapees. U.S. Br. 14 ("The United States Marshals Service informs us that it assigns a law enforcement officer to seek to capture all criminals who fail to report to prison."). But at least one published report calls the inference into doubt. Sarah Lindenfeld, *Prisoner Hops Off the Bus*, Raleigh News & Observer, Feb. 22, 1999, at A1 (prisoner riding from one facility to another on a

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there is no ambiguity in the statute. U.S. Br. 48. But members of this Court have disagreed. *Begay*, 128 S. Ct. at 1592 (Alito, J., dissenting) (stating that "the so-called 'residual clause' of [the ACCA] calls out for legislative clarification"); *James*, 127 S. Ct. at 1602 (Scalia, J., dissenting) (stating that the boundaries of the ACCA's "residual provision" were "ill defined").

Greyhound bus did not disembark as expected; U.S. Marshals would not pursue until given a court order, stating "[t]he inmates we transfer this way don't pose any danger"). If an offender's punishment is to be increased on the basis of a finding that the government sufficiently prioritizes capture of those who have committed the offense at issue, such that a confrontation is in fact sufficiently likely to occur between the offender and law enforcement, the question must be presented to a jury.

Similarly, the prospect that any such confrontation would prove violent also presents a factual question. The government claims it would because failure-to-report escapees commonly have prior violent criminal histories. As discussed above, however, the government's own evidence suggests that the prospect of violent confrontation is low. *Supra* at 15-16.[10] Under the Sixth Amendment, petitioner's sentence cannot be increased based on a court's weighing of the evidence and inferential reasoning.

These serious constitutional concerns provide an additional reason not to stray from the categorical approach. The government's efforts to complicate application of this statute and broaden its scope beyond any definable limits should be rejected.

II. THE RESIDUAL SUBCLAUSE IS LIMITED TO PROPERTY CRIMES.

Even if this Court were to abandon the categorical approach and *Begay*, adopt the government's

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[10] Further, the inference the government is asking this Court to draw amounts either to double-counting (for those failure-to-report escapees with a violent criminal history, the prior violent felony would already count against them) or the false attribution of prior violent conduct (for those who, in fact, have no prior violent crimes in their past). Neither is permissible.

approach to interpreting the statute, and conclude as a matter of fact that the risk of injury associated with failure-to-report escape is similar to that of the enumerated offenses, this Court still would have to conclude that the residual subclause is not limited to property crimes before it could affirm the court of appeals' decision. The government does not and cannot argue that failure-to-report escape is a property crime. Instead, the government argues that the residual subclause is not limited to property crimes. The government is wrong.

The government asserts that the property crime limitation finds no support in the text of the ACCA. U.S. Br. 37. But even the government does not deny that its interpretation of the residual subclause causes clause (ii) of the definition of "violent felony" to swallow clause (i) entirely. *Id*. at 43. The need to avoid rendering clause (i) superfluous provides a textual basis for narrowing the residual subclause in a way that preserves the efficacy of clause (i). *Knight* v. *Commissioner*, 128 S. Ct. 782, 788-89 (2008); *see also Jones* v. *United States*, 529 U.S. 848, 857 (2000) ("'Judges should hesitate ... to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense.'") (omission and alteration in original).[11] When, as here, it is clear that two closely related provisions of a statute should be interpreted "in tandem," consulting legislative history makes

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[11] The government argues that its interpretation of clause (ii) does not render clause (i) superfluous because clause (i) provides a simpler way to determine that some crimes are violent felonies than the complicated method they propose should be used under clause (ii). U.S. Br. 43-44. The government offers no authority for this novel proposition.

sense. *Safeco Ins. Co. of Am.* v. *Burr*, 127 S. Ct. 2201, 2213 n.15 (2007).

This need to narrow the scope of the residual subclause warrants consulting the Act's drafting history to identify the best narrowing principle.[12] The government tries to downplay the fact that the language that ultimately became the residual subclause was the product of a legislative inquiry into whether and how to incorporate crimes against property into the ACCA. *See* H.R. Rep. No. 99-849, at 3, 5 (1986). The government argues that the residual subclause was intended to treat property crimes "as a subset of a broad category." U.S. Br. 43. But nothing in the House Report discussing the language that became the residual subclause suggests that Congress was thinking beyond property crimes. The government is seizing on the residual subclause's potentially expansive language to stretch the statute beyond what Congress intended.

The government also argues that the enumerated offenses are not property crimes, and hence it makes no sense to limit the residual subclause to property crimes. U.S. Br. 37-40. But the fact that crimes involving the use of explosives and extortion *can* be committed without harming or seeking to take property does not change the fact that in the

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[12] The government argues that the statute is not ambiguous, and therefore this Court should not consult the legislative history at all. U.S. Br. 42. Yet this is the third consecutive term that this Court has had to construe the residual subclause, which amply supports the view expressed by members of this Court that the clause is in need of "clarification," *Begay*, 128 S. Ct. at 1592 (Alito, J., dissenting), and is "ill-defined," *James*, 127 S. Ct. at 1602 (Scalia, J., dissenting). Perhaps that is why this Court is no stranger to the ACCA's legislative history. *Begay*, 128 S. Ct. at 1585-86; *Taylor*, 495 U.S. at 581-89.

"ordinary case," *James*, 127 S. Ct. at 1597, those crimes involve harm to property and the unlawful acquisition of property.[13] And the fact that the enumerated offenses were added at the last minute before passage of the ACCA, and attached to what became the residual subclause, suggests that Congress understood them as exemplars of the kinds of property crimes it intended to target. *See* Pet. Br. 33.

The enumerated offenses, in their ordinary incarnations, all pose threats to property. Congress crafted the language that became the residual subclause to capture such property crimes. And limiting the clause to such crimes preserves the significance of clause (i) of the definition of violent felony.

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[13] The government argues that extortion is generally considered a crime against the government, not property. U.S. Br. 38-39 (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4, at 197-98 (2d ed. 2003)). But the cited passage discusses extortion's *origins* as a crime solely against the government. When discussing current law and extortion more generally, LaFave stresses that it is a property crime that should be grouped with other property crimes under theft. 3 LaFave, *supra* § 20.4(b), at 204; *see also id.* § 19.8(d), at 145-48 ("Extortion (blackmail) may be thought of as simply another way—in addition to the ways encompassed by the three crimes of larceny, embezzlement, and false pretenses—in which one person can misappropriate another's property.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 24, 2008

APPENDIX

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
October 15, 2008

Robert N. Hochman, Esq.
Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603

Dear Mr. Hochman:

This letter responds to your request of October 7, 2008, for additional information about the statistics cited on pages 16-17 and in Appendix B of the Brief for the United States in *Chambers v. United States*, S. Ct. No. 06-11206. Your letter asks how we obtained those statistics and whether attorneys for the United States made any effort to verify them.

The federal statistics cited on page 16 and 4a of the government's brief represent a summary of data that our office obtained from the Office of Policy and Legislation (OPL) of the Criminal Division of the United States Department of Justice. OPL used data provided by the United States Sentencing Commission to prepare the information that it provided to us. Justice Department attorneys prepared the summary on page 4a of the government's brief and verified that the summary accurately reflects the data provided by OPL. Those attorneys did not, however, attempt to verify the underlying data.

We also received from OPL other data, which OPL had prepared from data provided by the Sentencing Commission, about defendants convicted of escape under 18 U.S.C. 751 or 4082. We have attached to this letter the 16-page report that OPL provided to us. See Attachment A. The data on pages 16 and 4a of the government's brief comes from the third chart on page 12 of the OPL report. The other charts in the OPL report contain information on the primary offense of conviction, the district of conviction, the race or ethnicity of the offender, the type of sentence imposed, the length of the term of imprisonment, the presence of a weapon, and the application of various Guidelines adjustments (including adjustments for aggravating or mitigating role in the offense, obstruction of justice, reckless endangerment during flight, armed career criminal status, career offender status, commission of the offense less than two years after a prior offense, and the addition of criminal history points for prior violent convictions).

The state statistics cited on pages 16-17 and 5a-11a of the government's brief represent a summary of data that our office obtained by requesting information from the departments of corrections of several of the larger States. We asked those States for available data describing the number of non-custodial escapes during the past five years, the crimes for a which the escapees were sentenced at the time of their escapes, whether the escapees committed other crimes while absent from custody, and whether there was violence associated with recapture.

Several States did not provide us with any data or did not provide data capable of statistical analysis. Several other States provided data that either did not include failure-to-report and failure-to-return escapes

or did not isolate those types of escape from other types of escape. The government did not use that data in its brief. Accordingly, we will not discuss that data further.

Five States provided us with data that isolated failure-to-report and failure-to-return escapes from other types of escape and reported the crimes for which the escapees were sentenced at the time of their escapes. Justice Department attorneys prepared the summary tables on pages 5a-11a of the government's brief using that data. Those attorneys did not however, seek to verify the underlying data. We have attached to this letter the reports sent to us by each of the five States. See Attachments B-F.

In response to your letter, we reviewed the summary tables prepared by our attorneys and discovered two mistakes. One of the two mistakes was a printing error that did not affect the statistics cited in the body of our brief. The other mistake, however, requires corrections to the statistics for Massachusetts on pages 16-17 of the brief. After consultation with the Clerk's office, we are filing a corrected Brief for the United States, along with a letter to the Court, on which you are copied, informing the Court of the corrections. We are serving you under separate cover with copies of the corrected brief.

A few of the States sent us additional data on crimes committed by escapees before recapture and on violence during recapture. We did not use that information in preparing our brief. That information is, however, included in the reports attached to this letter.

In order to assist your review of the attachments, we have described below the data provided by each of

the five States that isolated failure-to-report and failure-to-return escapes. In the course of that description, we have also explained more fully the corrections that we made to our brief to ensure that we accurately described the data:

- *Florida:* An official with the Florida Department of Corrections provided us with two spreadsheets of escapee data. Those spreadsheets are included in Attachment B to this letter. The first spreadsheet contains a table listing, by primary offense, the number of escapes from work release from July 1, 2003, through June 25, 2008. The second spreadsheet contains more detailed offense information for the escapees from the first table who were in the primary offense groups of "burglary," "property theft/fraud/damage," and "drugs." The first spreadsheet also contains an additional table describing violent escape conditions for certain escapees.

  Justice Department attorneys combined the data from the two tables listing the primary offense for the escapees to produce a master table from which they calculated the percentage cited on page 16 of the government's brief. In reviewing the Florida summary table on page 5a of the government's brief, we discovered that the table omits the final three lines of our Master table of Florida data. Our corrected brief includes the full summary table.

- *Massachusetts:* An official with the Massachusetts Department of Correction provided us via e-mail with information about escapes between January 1, 2003, and June 30, 2008. That information includes the offenses for which the escapees were sentenced at the time of

their escapes, the nature of the escapes (custodial, walk-away, or failure to return from release into the community), whether charges were filed against the escapees for crimes committed during the escape, and whether records indicate that the escapes involved violence.

Justice Department attorneys entered the information about the offenses for which the escapees were sentenced at the time of their escapes into a summary table, which we used to create the chart on page 6a of the government's brief and to calculate the statistics cited on pages 16-17 of the brief. In reviewing our summary table, we discovered that it mistakenly classified the four walkaway escapees in 2008 as failure-to-return escapees. That error was also reflected in the chart in our brief. We have corrected that mistake in the chart in our corrected brief. Based on the corrected figures, the corrected brief also revises the Massachusetts statistics on pages 16-17 as follows: "77%" in the parenthetical on page 16 now reads "72%" and "64%" in footnote five on page 17 now reads "56%."

We have included the substance of the e-mail from the Massachusetts Department of Correction, as well as a copy of the (corrected) summary table prepared by Justice Department attorneys, in Attachment C to this letter.

- *North Carolina:* An official with the North Carolina Department of Correction provided us with two spreadsheets of data about failure-to-return escapes from July 1, 2003, to June 30, 2008. Those two spreadsheets are included in Attachment D to this letter. The first

spreadsheet lists, for each escapee, the date of escape, the crime of incarceration, the type of authorized release from which the escapee failed to return, and whether the escapee was found to have committed additional crimes before recapture. The second spreadsheet reports on the escapees' most serious offense prior to escape. Justice Department attorneys used the data from the first spreadsheet to calculate the summary table on pages 7a-8a of the government's brief.

- *Pennsylvania:* An official with the Pennsylvania Department of Corrections provided us with a spreadsheet that lists the offenses of incarceration for walkaway escapes and failure-to-return escapes between January 1, 2003, and June 24, 2008. The table further breaks down how many of those escapees were captured and how many were still at large. Justice Department attorneys used the failure-to-report data from that spreadsheet to generate the summary table at pages 9a-10a of the government's brief. The spreadsheet provided by Pennsylvania is included in Attachment E to this letter.

- *Washington:* An official with the Washington Department of Corrections provided us with tables containing information on failure-to-return escapes from January 1, 2003, through July 23, 2008. The Washington official provided a table listing the offenses for which the escapees were incarcerated a second table providing a detailed breakdown for the offense category of "drugs," and a table listing new crimes committed by the escapees while on escape status. The tables provided by

Washington are included in Attachment F to this letter. Justice Department attorneys used the data on the offenses for which the escapees were incarcerated to prepare the summary table at page 11a of the government's brief.

We hope this information is of assistance, and we regret the inaccuracies in our initial brief.

Sincerely,

/s/ Gregory G. Garre
Gregory G. Garre
Solicitor General

ATTACHMENT B

FLORIDA DATA

Florida Department of Corrections
Bureau of Research and Data Analysis
Date of production: June 25, 2008

WRC Escapes since 7/1/2003 by Primary Offense Groups

PRIMARY OFFENSE GROUP COUNTS		
PRIMARY OFFENSE GROUP	Count	Cumulative Count
1 -MURDER/MANSLAUGHTER	9	9
3 -ROBBERY	38	47
4 -VIOLENT, OTHER	25	72
5 -BURGLARY	142	214
6 -PROPERTY THEFT/FRAUD/DAMAGE	128	342
7 -DRUGS	182	524
8 -WEAPONS	22	546
9 -OTHER	39	585

Level 3 Violent Escape Conditions for WRC Escapes Since 7/1/1995

Violence During Escape Periods	Count	Cumulative Count
1 - Violence while being arrested/returned	1	1
2 - Violence while attempting to escape	2	3
3 - Violence/crime after escape prior to arrest	7	10
4- Unknown or not specified	5	15

Additional Offense Breakdown for Burglary, Theft and Drugs

Primary Offense Group/Primary Offense Description by Felony Class						
Primary Offense Group/Primary Offense Description	1ST DEGREE	1ST/LIFE	2ND DEGREE	3RD DEGREE	LIFE	Total
5-28-BURGLARY, STRUCTURE	0	0	3	35	0	38
5-29-BURGLARY, DWELLING	0	0	90	4	0	94
5-30-BURGLARY, ARMED	3	2	0	0	0	5
5-31-BURGLARY WITH ASSAULT	0	1	0	0	2	3
5-32-BURGLARY/TRESPASS, OTHER	1	0	0	1	0	2
6-33-GRAND THEFT, OTHER	0	0	2	25	0	27
6-34-GRAND THEFT, AUTOMOBILE	0	0	0	35	0	35
6-35-STOLEN PROPERTY	2	0	43	0	0	45
6-36-FORGERY/COUNTERFEITING	0	0	0	6	0	6
6-37-WORTHLESS CHECKS	0	0	0	2	0	2
6-38-FRAUDULENT PRACTICES	1	0	1	6	0	8
6-39-OTHER THEFT/PROPERTY DAMAGE	0	0	0	5	0	5
7-40-DRUGS, MANUFACTURE/SALE/PURCHASE	15	0	82	8	0	105
7-41-DRUGS, TRAFFICKING	25	0	1	0	0	26
7-42-DRUGS, POSSESSION/OTHER	0	0	0	51	0	51
Total	47	3	222	178	2	452

ATTACHMENT C

MASSACHUSETTS DATA

An official of the Massachusetts Department of Correction Fugitive Apprehension Unit, provided our Office via e-mail with the following information about Massachusetts escapes from January 1, 2003, through June 30, 2008. We have reproduced the substance of the e-mail, adding some underscoring and line breaks:

2008 escapes to date 4.
All were walkaways, none used violence to escape and none used violence when captured. Two were serving time for armed robbery and two were serving time for unarmed robbery. No new charges have been reported on any of the four.

2007 escapes we had 4.
All were work release, none used violence to escape and none used violence when captured. One was serving time for Distribution of Class B Cocaine, one for Larceny over $250 x 11, one for theft of a motor vehicle, one for weapons violations. No new charges have been reported on these four.

2006 escapes we had 9.
5 were walkaways, none used violence to escape or when they were captured. One serving time for armed robbery gun (no new charges when captured), one serving time for armed assault in a dwelling (new charges were B+E Night time and Larceny less than $250), one serving time for Mayhem (no new charges when captured), one for possession of class B Cocaine with intent to distribute (no new charges when captured) and one was serving time for poss[.] weapon, assault, and ABDW (new charges when captured were assault to commit a felony, assault and battery, and assault to rape).

Two of the escapes were from work release, neither used violence to escape nor when captured. One was serving time for ABDW firearm (no new charges when captured) and one serving time for ABDW, Larceny, and B+E (no new charges when captured).

Two of the escapes were from program related activities, neither used violence to escape nor when captured. One was serving time for Unarmed Burglary and the other for False Checks, Poss[.] of Class B, and sex for a fee. Neither had new charges when captured.

2005 escapes we had 10.

4 were walkaways, none used violence to escape nor when captured and none had new charges when captured. One was serving time for B+E Daytime with intent to commit a felony, one for receiving stolen goods, one for armed assault to rob or murder, and one for receiving a stolen motor vehicle.

5 escapes were from work release programs, none used violence to escape nor when captured and none had new charges. Three were serving time for Armed Robbery, one for ABDW - Gun, and one for Armed Assault/Armed Robbery[.]

The other escape was from a secure facility.

2004 escapes we had 4.

2 were walkaways, neither used violence to escape not when captured and neither had new charges when captured. One was serving time for ABDW x3 and MV Theft, and the other for ABDW.

Two were escapes from work release programs, neither used violence when escaping. One was serving time for B+E night time with intent to commit a felony, no new charges when captured. The other was serving time for ABDW and OUI, he resisted when captured and was charged with

resisting arrest and assault and battery on a police officer X 3.

2003 escapes we had 6.
2 were walkaways, one serving time for Distribution of Class B Cocaine (charged with failing to stop for a police officer when captured) and the other was serving time for B+E night time with intent to commit a felon[y] and receiving stolen goods (no new charges when captured).

Three of the escapes were from Work Release Programs, one was serving time for Poss[.] Class B Cocaine with intent to distribute (when captured charged with Conspiracy to violate drug laws, possession of Class D, Resisting arrest, interfering with police officer and A+B on a police officer), one was Serving time for Distribution of Class B Cocaine (no new charges when captured), and one was serving time for MV Theft (no new charges when captured).

The other escape was from a secure facility.

Justice Department attorneys placed the data onto tabular form, as follows:

Commitment Offense	2003		2004		2005		2006		2007		2008		TOTAL	
	WA	FTR	WA	FTR	WA	FTR	WA	FTR	WA	FTR	WA	FTR	WA	FTR
Armed robbery						3	1				2		3	3
Unarmed robbery											2		2	
Armed assault					1	1	1						2	1
Assault and battery w/ deadly weapon			2	1		1	1	2					3	4
Mayhem							1						1	
Distribution of class B cocaine	1	1							1				1	2
Possession of class B cocaine w/ intent to dist.		1					1						1	1
Possession of class B drug								1						1
Larceny over $250									1					1
Receiving stolen goods					1								1	
Breaking and entering w/ intent to commit felony	1			1	1								2	1
Unarmed burglary								1						1
Theft of a motor vehicle		1							1					2
Receiving stolen motor vehicle					1								1	
Weapons violation									1					1

WA=Walk-away escape
FTR=Failure to return from work release or program-related activities in the public sector